00-1083 (1)

Supreme Court, U.S.
FILED
DEC 21 2000
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

SCOTT GOLDSTEIN,

Cross-Petitioner,

v.

CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

CHARLES G. BYRD, JR.
ALSTON & BYRD
Attorney for Cross-Petitioner
2518 Maryland Avenue
Baltimore, Maryland 21218
(410) 235-7811

164255

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

27 pp

QUESTION PRESENTED

Whether the Fourth Circuit erred in holding that the Respondent was not entitled to a jury trial notwithstanding the fact that the circuit court found that the Petitioners' proffered reason for suspending and terminating the Respondent was not credible and not supported in the record, the Petitioners' acknowledgment that the Respondent's exercise of his First Amendment right of free speech was a factor in the decision to suspend and terminate the Respondent, and the district court's ruling in which it held that it would grant a jury trial to the Respondent if the Petitioners had originally terminated the Respondent as opposed to suspending him?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	2
1. The Suspension of Goldstein	5
2. The Expulsion of Goldstein	11
Reasons for Granting the Writ	13
A. The Circuit Court's decision on the merits is in conflict with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*	13
B. Genuine issues of material facts exist as to the Petitioners' motivations in suspending Goldstein.	15
C. Genuine issues of material facts exist as to whether Goldstein's expulsion from Chestnut was in retaliation of his exercise of his First Amendment right of free speech.	20
Conclusion	22

TABLE OF CITED AUTHORITIES

Page

Cases:

Connick v. Myers, 518 U.S. 668, 116 S. Ct. 2342 (1996) 15, 17

Mt. Health City Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977) 15

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 116 S. Ct. 2353 (1996) 15

Reeves v. Sanderson Plumbing Products, Inc., __ U.S. __, 120 S. Ct. 2097 (2000) 13, 14, 22

United States Constitution:

First Amendment ..... *passim*

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1983 13

42 U.S.C. § 1983 ..... 2, 3, 19

Rule:

United States Supreme Court Rule 12.5 2

Cited Authorities

Page

Other Authorities:

Article V, Section 2.2 of Chestnut's Bylaws 7

Article V, Section 2.4 of Chestnut's Bylaws 7

Scott Goldstein, respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Scott Goldstein v. Chestnut Ridge Volunteer Fire Company*, 218 F.3d 377 (4th Cir. 2000).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 218 F.3d 377 and is reprinted in the appendix to Petitioners' petition for writ of certiorari at Appendix A at 1a-52a. The order of the Fourth Circuit's denial of Petitioners' Petition for Re-Hearing En Banc is reprinted in the appendix to Petitioners' petition for writ of certiorari at Appendix B at 53a-54a. The Memorandum opinion and order of the United States District Court for the District of Maryland dated January 7, 1999 is reprinted in the appendix to Petitioners' petition for writ of certiorari at Appendix D at 57a-67a. The Memorandum opinion and order of the United States District Court for the District of Maryland dated November 11, 1997 is reported at 984 F. Supp. 367 and reprinted in the appendix to Petitioners' petition for writ of certiorari at Appendix E at 68a-86a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fourth Circuit issued its decision and judgment on July 12, 2000. A timely Petition for a Re-Hearing En Banc was denied on August 23, 2000. Petitioners timely filed a petition for writ of certiorari and said petition was placed on the docket in this Court on November 21, 2000.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioners' petition for a writ of certiorari.

STATEMENT OF THE CASE

In this case, Respondent Scott Goldstein ("Goldstein") sued for the unlawful discriminatory acts committed by the Petitioners against him, motivated by and solely on account of Goldstein's exercise of his right of First Amendment right of free speech. In his original complaint, Goldstein alleged that the Petitioners unlawfully and unconstitutionally disciplined, suspended and expelled him from The Chestnut Ridge Volunteer Fire Company ("Chestnut"). Relief was sought, *inter alia*, pursuant to the Reconstruction Era Civil Rights Acts codified at 42 U.S.C. § 1983.

Goldstein claimed that he was disciplined, suspended and expelled because he informed Richard Yaffee ("Yaffee"), the President of Chestnut, and the Executive Committee of Chestnut, that several of Chestnut's members who respond to fire and medical emergency alarms were unlawfully doing so because they lack the necessary training and qualifications required by federal, state and Baltimore County law, the Baltimore County Volunteer Fire Association, and Chestnut's own Constitution and By-Laws.

The case proceeded in two phases. The first phase was on the issue of whether "state action" is present in the case, i.e., whether Chestnut and its officers are "state actors" for purposes of 42 U.S.C. § 1983. If Chestnut and its members

were deemed to be "state actors" at the conclusion of phase one, the case would then proceed to phase two, the merits of the case.

Discovery therefore proceed on the "state action" issue, and the parties filed cross motions for summary judgment. On August 21, 1997, the district court granted Goldstein's motion for summary judgment and denied Petitioners' motion for summary judgment on the "state action" issue. The district court held that Chestnut and its officers are "state actors" for purposes of 42 U.S.C. § 1983.

Petitioners then filed a Motion to Alter or Amend Judgment. Goldstein opposed the Motion to Alter or Amend Judgment. The district court granted the motion in part and denied the motion in part. The portion of the motion granted by the district court pertained to the appropriateness of the granting of summary judgement in favor of Goldstein. Petitioners argued that the issue as to whether state action existed for purposes of 42 U.S.C. § 1983 was dependent upon the merits of the reasons Goldstein was disciplined, suspended and expelled.

By memorandum and order dated November 13, 1997, the district court reversed its earlier decision and denied Goldstein's motion for summary judgment "on the ground that ultimate resolution of the cognizability of this action under 42 U.S.C. § 1983 will turn upon the merits of the reasons that plaintiff was disciplined, suspended and terminated. . . ." *See also Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 984 F. Supp. 367 (D. Md. 1997).

The case then proceed on the merits. After conducting discovery on the merits, Petitioners moved for summary

judgment on all remaining issues. Goldstein filed a cross motion for partial summary judgment on the issue of his suspension given that the Petitioners essentially admitted that they suspended Goldstein because he wrote letters to Chestnut and its officers in which he alleged that certain members of Chestnut were responding to emergency fire and medical alarms lacked required training and certification, matters which were true and of great public concern. By memorandum and order dated January 7, 1999, the district court denied Goldstein's motion for partial summary judgment and granted Petitioners' motion for summary judgment. Goldstein appealed the district court's January 7, 1999 to the Fourth Circuit.

The Fourth Circuit affirmed the decision of the district court. With respect to the merits of Goldstein's claim, the Fourth Circuit held that although the Petitioners' proffered reason for suspending and terminating Goldstein was not credible and not supported in the record, the Petitioners' acknowledgment that the Goldstein's exercise of his First Amendment right of free speech was a factor in the decision to suspend and terminate Goldstein, and the district court's ruling in which it held that it would grant a jury trial to Goldstein if the Petitioners had originally terminated Goldstein as opposed to suspending him, Goldstein was not entitled to a jury trial because he did not allegedly did not present sufficient facts from which a reasonable jury could find that Goldstein's exercise of his right of free speech was a "substantial factor" in the decision to suspend and terminate him. Goldstein, of course, disagrees. The facts in the case are as follows:

1. The Suspension of Goldstein

Goldstein has been a member of Chestnut since January, 1985. Over time, Goldstein became aware that several of Chestnut's members who responded to fire and medical emergency alarms were unlawfully doing so because the lacked the necessary training and qualifications required by federal, state and Baltimore County law, the Baltimore County Volunteer Fire Association, and Chestnut's own Constitution and By-Laws. For example, Goldstein learned that several members of Chestnut who had responded to fire and emergency medical alarms lacked mandated and required: (1) current CPR training and/or certification, (2) hazardous materials operations training and/or current training, (3) blood borne pathogens training, and (4) proper Personal Accountability Tags. Goldstein also learned that Chestnut lacked adequate medical supplies and other equipment at certain times. Goldstein further learned that Chestnut's Captain, Nick Coroneos, deliberately refused to enforce Chestnut's own training requirements for Chestnut members which were promulgated to insure public safety. Accordingly, beginning in December, 1995, Goldstein began to advise the President of Chestnut, Yaffee, and the Executive Committee of Chestnut, in writing, of the serious public safety violations being committed by Chestnut.

The first such instance was a memorandum dated December 20, 1995 from Goldstein to the Executive Committee of Chestnut. In the memorandum, Goldstein advised the Executive Committee that certain members lacked required training and certification, including basic CPR certification. Yaffee believed that the matters raised by Goldstein were "very serious" to Goldstein, and he believed that the issues regarding the lack of training to be very

important. Indeed, the matters raised by Goldstein were so important to Yaffee that Yaffee issued a memorandum to the Executive Committee five days later on December 25, 1995, in which reminded the Executive Committee that it is very important that Chestnut members have required training and certifications, and that any person who "does not have a current CPR certification should not be allowed to ride the apparatus."

Thereafter, Goldstein wrote letters and/or memoranda to Yaffee dated January 4, 1996, January 11, 1996, and January 19, 1996, in which he brought several safety issues to Yaffee's attention. Yaffee never investigated any of Goldstein's concerns. Yaffee did, however, address some of Goldstein's concerns, and Goldstein agreed, despite the fact that he was not obligated under Chestnut's constitution and by-laws, that he would bring any future concerns to Yaffee's attention before resorting to any other actions.

In March, 1996, Goldstein became increasing concerned about the fact that several members of Chestnut were continuing to respond to emergency fire and medical alarms without the required training and/or certifications. Accordingly, on March 10, 1996, Goldstein sent a memorandum to Yaffee advising him of same. Four to five days prior to the March 10, 1996 memorandum, Goldstein had attempted to contact Yaffee without success. Yaffee did not return Goldstein's calls or otherwise respond. Goldstein likewise did not receive a response from Yaffee to his March 10, 1996 memorandum. Accordingly, on March 11, 1996, Goldstein issued an identical memorandum to the Executive Committee of Chestnut. The March 11, 1996 memorandum to the Executive Committee, as well as the previous letters

written by Goldstein, were written out of concern for the public safety and well being of the Owings Mills community where Goldstein, his parents and friends live.

In response, Yaffee summarily suspended Goldstein from Chestnut in a letter dated March 15, 1996. In the letter, Yaffee states that he is suspending Goldstein because Goldstein did not bring the problems mentioned in his March 11, 1996 memorandum to the Executive Committee to this attention first, and because the memorandum to the Executive Committee is "full of blatant and malicious allegations." At deposition, however, Yaffee admitted that several of the matters mentioned in the March 11, 1996 memorandum were true, i.e., that some of the individuals mentioned in the memorandum did indeed lack the required training and/or certification. Likewise, the captain of Chestnut who is responsible for insuring that Chestnut members had successfully completed all required training and/or certifications, Nick Coroneos ("Coroneos"), admitted that several of the individuals mentioned in Goldstein's March 11, 1996 memorandum lacked the mentioned training and/or certification. Yaffee further admitted that although he supposedly suspended Goldstein because Goldstein did not come to him first with his concerns, Chestnut's constitution and by-laws do not require Goldstein to bring concerns to him before presenting same to the Executive Committee.

In a letter dated March 15, 1996 to the Vice-President of Chestnut, Ross McCausland ("McCausland"), Yaffee charged that Goldstein violated Article V, Section 2.2 of Chestnut's Bylaws which prohibits a member from engaging in behavior detrimental to the good order of the company, and Article V, Section 2.4 which prohibits a member from making Comments or engaging in behavior prejudicial to

the good reputation, order and discipline of the company. At deposition, Yaffee testified that if a member raised a safety issue and the safety issue was detrimental to the good and welfare of the company, i.e., not in the best interest of Chestnut, the raising of the safety issue would violate Chestnut's bylaws. In the March 15, 1996 letter to McCausland, Yaffee appointed an Investigating Committee to investigate the charges he levied against Goldstein. McCausland was appointed the Chairman, and Eugene Reynolds ("Reynolds") and William Newberry ("Newberry") were appointed committee members.

The Investigating Committee purportedly investigated the charges levied by Yaffee, but never interviewed or otherwise talked to Goldstein during its investigation. The Investigating Committee recommended to the Executive Committee that Goldstein be suspended for a period of 90 days. McCausland testified that the Investigating Committee recommended that Goldstein be suspended because Goldstein engaged in a pattern of behavior that lead to his suspension.

McCausland also asserted a laundry list of minor incidents that were, at best, highly suspect, and that no reasonable jury could conclude to be the real reason for Goldstein's suspension. For example, McCausland asserted that one of the factors considered in the decision to suspend Goldstein was suspected drug use on the part of Goldstein. However, when pressed for specifics for his allegation, McCausland admitted that the drug use assertion was based solely upon a single incident in which McCausland believed that the behavior of two individuals was the result of the influence of drugs and the fact that Goldstein disagreed with McCausland's assessment of the situation.

McCausland further asserted that the Investigating Committee also recommended to suspend Goldstein because Goldstein sent to the March 11, 1996 memorandum to the Executive Committee as opposed to Yaffee, and for the allegations contained in the letters Goldstein wrote from December 20, 1995 to March 11, 1996 regarding the lack of training and/or certification of certain Chestnut members to the extent said allegations were false. McCausland acknowledged, however, that some of the allegations contained in Goldstein's letters regarding the lack of training and/or certifications were true. The reasons for the Investigating Committee's recommendation cannot be fully examined because although a file was created and the Committee had numerous documents, the Committee's file was conveniently lost.

By letter dated March 21, 1996, the Investigating Committee recommended to the Executive Committee that Goldstein be suspended for a period of 90 days, and that the **expulsion** of Goldstein may be recommended by the Committee in the future. On March 29, 1996, a purported hearing was had before the Executive Committee and Goldstein was permitted to appear. Goldstein, however, was not advised of all of the reasons why the Investigating Committee was recommending that he be suspended. The Executive Committee unanimously voted to suspend Goldstein for 90 days based upon the Investigating Committee's recommendation; the reasons therefore included the alleged critical nature and tone of Goldstein's letters, and the fact that Goldstein forwarded his March 11, 1996 letter to the Executive Committee and not President Yaffee.

The Petitioners have admitted that Goldstein's allegations in his letters regarding the lack of required

training and/or certification of Chestnut members are true. Indeed, the district court so found. *See* Petitioners' Appendix at 40A n.10. For example, after Goldstein made his allegations, Yaffee and Coroneos issued a memorandum to the Executive Committee setting forth the training and/or certification needed by certain members of Chestnut. Indeed, Michael Fox ("Fox"), who was responsible for member training and certifications in 1996, testified that it is possible that Chestnut members responded to emergency fire and medical alarms without the required certification and/or training. Newberry admitted that he agreed with Goldstein's statement in Goldstein's memorandum dated January 11, 1996 that leaving chains on an engine in four wheel drive was very dangerous. Fox likewise agreed that the use of stokes baskets and backboards referenced in Goldstein's January 11, 1996 memorandum would be of assistance in responding to emergency medical alarms. Notwithstanding these admissions, Yaffee never investigated or filed charges with respect to a single issue raised by Goldstein although he had the power to do so. Under Chestnut's Bylaws, a matter cannot be investigated unless charges are filed.

Petitioners claim that the letters written by Goldstein had the company in turmoil. Goldstein, however, forwarded the letters to President Yaffee and the Executive Committee, and the Executive Committee did not share Goldstein's letters with the membership. Accordingly, it is difficult to image how the letters authored by Goldstein caused the entire company to be in turmoil. Furthermore, when pressed to state with specificity what Goldstein actually did to cause the company to be in a state of turmoil and/or to describe the turmoil in the company, the Petitioners were unable to do so.

After Goldstein was suspended, he had a telephone conversation with Newberry. Newberry advised Goldstein that some of the matters raised in his letters were valid and that he was suspended because the Executive Committee was not going to tolerate him putting everything in writing that he found wrong with the company, and that the company was not going to investigate every single matter raised by Goldstein. In other words, Chestnut was attempting to discourage Goldstein from writing any more letters.

2. The Expulsion of Goldstein

Goldstein was suspended for a period of 90 days beginning on March 29, 1996. Goldstein was therefore suspended until June 27, 1996. While under suspension, Goldstein could not respond to emergency fire or medical alarms on behalf of Chestnut, could not enter the firehouse, and could not speak or sign documents on behalf of Chestnut. Goldstein is a CPR instructor certified by the American Red Cross. On May 20 and 22, 1996, Goldstein, out of the kindness of his heart, agreed to provide CPR training to certain members of Chestnut, one of whom is an individual named Eddie Ryan ("Ryan"). Goldstein was not acting on behalf of Chestnut when he was providing CPR training to Chestnut members in May, 1996. The Chestnut member in charge of insuring that Chestnut members receive the appropriate medical training, Donald Friedel ("Friedel"), testified that Goldstein was not under the supervision of Chestnut when he conducted the CPR classes.

Yaffee claims that in a telephone conversation with Goldstein on May 20, 1996, Goldstein advised him that Ryan had taken the CPR class and had passed the test for same. Yaffee, however, did not take any notes of the conversation.

Goldstein denies that he told Yaffee that Ryan took the class on May 20, 1996. Goldstein testified that Ryan actually took the CPR test and passed same on May 22, 1996, as opposed to May 20, 1996. In fact, in a letter dated August 27, 1996, Ryan advised the Executive Committee of Chestnut that he took and passed the CPR test on May 22, 1996.

Yaffee and Coroneos requested Friedel to conduct an investigation as to whether Goldstein had either falsified documents and/or made false statements to the company. Friedel suspended Goldstein and conducted an investigation. During the investigation, Ryan advised Friedel that he had taken and passed a CPR test administered by Goldstein on May 22, 1996. Notwithstanding same Friedel brought charges against Goldstein for falsification of company documents.

Yaffee then appointed an Investigating Committee to investigate the charges filed by Friedel. McCausland was again appointed chairman and Kakel and Reynolds were appointed members of the Committee. Ryan advised the Investigating Committee that he took the CPR class given by Goldstein on May 22, 1996. The Investigating Committee, however, was only interested in whether Ryan took the test on May 20, 1996, as opposed to May 22, 1996. Because Ryan did not take the CPR class on May 20, 1996, the Investigating Committee recommended to the Executive Committee that Goldstein be expelled from Chestnut. Although the Executive Committee had no reason to believe that Ryan did not take and pass a CPR test on May 22, 1996, on August 29, 1996, the Executive Committee voted to expel Goldstein from Chestnut and advised Goldstein of same in writing. Coroneos admitted that Goldstein's prior allegations that certain members of Chestnut lacked required training and/or

certification was a factor in the decision to expel Goldstein. Prior to the vote to expel Goldstein, McCausland advised Goldstein that the charges filed would not be taken seriously if this lawsuit, which was pending at the time, would go away.

REASONS FOR GRANTING THE WRIT

If this Court grants the petition for writ of certiorari in this case, which pertains solely to the issue as to whether Chestnut is a "state actor" for purposes of 28 U.S.C § 1983, it will also be called upon to review the issue of whether the Petitioners were entitled to summary judgment on the merits.

A. The Circuit Court's decision on the merits is in conflict with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*

In *Reeves v. Sanderson Plumbing Products, Inc.*, __ U.S. __, 120 S. Ct. 2097 (2000), this Court held that the trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation. In so holding, this Court stated as follows:

> [T]his Court held that the trier of fact may reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." [citations omitted] Moreover, once the employer's justification has been eliminated, discrimination may well be the

> most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Id. 120 S. Ct. at 2108-09.

Petitioners stated that they suspended and terminated Goldstein because his statements disrupted the company and put the company in turmoil. The Fourth Circuit, as did the district court, found these proffered reasons to be "generalized and unsubstantiated." Petitioners' Appendix A at 41a. The Fourth Circuit also found Goldstein's statements to be speech of the "highest public concern, and as such, they were entitled to the highest level of First Amendment protection." Petitioners' Appendix A at 40a. Notwithstanding same, the Fourth Circuit found that summary judgment was nevertheless appropriate in this case. The Fourth Circuit's published opinion is in direct conflict with the pronouncements of this Court in *Reeves v. Sanderson Plumbing Products, Inc.* that was issued 30 days prior to the Fourth Circuit's opinion. The Fourth Circuit's opinion did not address the standard this Court set out in *Reeves v. Sanderson Plumbing Products, Inc.*, and certiorari should be granted in order that this Court may have an opportunity to clarify its holding in *Reeves v. Sanderson Plumbing Products, Inc.*

As the following will show, review also in order because the district and circuit courts departed substantially from the summary judgment principles laid down by this Court.

B. Genuine issues of material facts exist as to the Petitioners' motivations in suspending Goldstein.

A government employee, and in this case, a person who is a member of a private entity performing a function traditionally the exclusive prerogative of the government, cannot be dismissed for exercising his First Amendment right of free speech. *Connick v. Myers*, 518 U.S. 668, 675, 116 S. Ct. 2342, 2347-48 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717, 116 S. Ct. 2353, 2356-57 (1996).

Pickering and *Connick* establish a two-step test to determine whether the speech of a public employee is constitutionally protected. First, the court must inquire whether the employee spoke on a matter of public concern. *See Connick*, 461, U.S. at 146-48. If so, the court must then balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Pickering*, 391 U.S. at 568. The entire balancing process is an inquiry of law for the court. The employee must also demonstrate that his protected speech was a substantial factor in the disciplinary decision. *Mt. Health City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977).

Unquestionably, the issues and matters raised by Goldstein in his letters to Yaffee and the Executive Committee are matters of public concern. The Petitioners did not argue to the contrary below. The fact that when a citizen calls the government by dialing 911 in a fire or medical emergency, and the fact that the personnel who respond to

the emergency alarm on behalf of the government lack CPR and or other required and mandated training and/or certification to adequately deal with the emergency at hand, is without a doubt, of great public importance and concern. Indeed, the district and circuit courts held that Goldstein expressed matters of public concern protected by the First Amendment. *See* Petitioners' Appendix A at 40a and Appendix D at 63a.

Petitioners also did not contest that the letters written by Goldstein were, if not the sole factor, a substantial factor in their decision to suspend Goldstein. Indeed, Newberry advised Goldstein that he was suspended because he continued to write letters to Yaffee and the Executive Committee. Petitioners, however, claimed below that their suspension of Goldstein was justified under the law. Petitioners initially argued below that they were justified in suspending Goldstein because of the critical nature and tone of the letters Goldstein wrote to Yaffee and the Executive Committee. That, however, is not justification for disciplining someone who exercises his First Amendment right of free speech on a matter of public concern. Indeed, in *Pickering*, this Court explicitly rejected the position argued by Chestnut below. In so doing, the Court stated as follows:

> [T]o the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1) (4) of appellant's letter, see Appendix, *infra*, **may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.** (Emphasis added)

391 U.S. at 570, 88 S. Ct. at 1735.

Recognizing that it is illegal to suspend Goldstein because of the tone of his letters which Petitioners essentially admit pertain to matters of extreme public concern, Petitioners then asserted below that this Court in *Pickering* and *Connick* implicitly held that even if the speech is protected by the First Amendment, the government nevertheless has a right to discipline an employee if the protected speech caused an upheaval and/or turmoil n the workplace. Petitioners' vague and general allegations that Goldstein's letters caused upheaval and turmoil in the entire fire company, however, are not substantiated by the record in this case. Indeed, as mentioned earlier, the Fourth Circuit so found. That is because Goldstein only forwarded the letters to President Yaffee and the Executive Committee, and the Executive Committee did not share Goldstein's letters with the general membership. Kakel Deposition at Accordingly, it is difficult to image how the letters authored by Goldstein caused upheaval and turmoil in the company. Moreover, Defendant have not come forward with any ***facts*** whatsoever to support their contention. Furthermore, when pressed to state with specificity what Goldstein actually did to cause the company to be in a state of turmoil and/or to describe the turmoil in the company, the Defendants were unable to do so.

The district court recognized that reasonable minds may reach different conclusions from the disputed facts, but nevertheless invaded the jury's province by determining the facts and the motivations of the Petitioners, improperly determined the credibility of the witnesses, considered hearsay testimony, and granted Petitioners' motion for summary judgment not because of the absence of a dispute of material fact; but instead, because of the type of discipline issued, i.e., suspension, as opposed to expulsion. In so doing, the district court stated as follows:

The next questions is whether expression of his protected comments constituted a substantial factor in defendants' decision to suspend him. *Mt. Healthy*, 429 U.S. at 287. This presents a close question, because it is not apparent whether plaintiff was suspended because of the content of his speech or the manner in which it was communicated. Several members of the Executive Committee testified in their depositions that plaintiff's false allegations,' letters, and accusations' were among the reasons they voted for suspension. On the other hand, most members of the Executive Committee also cited the disruptive nature of plaintiff's nitpicking' and the distractive manner' and tone of his letters. Two members noted Goldstein's failure to abide by his agreement with Yaffee to bring all problems to Yaffee before going to the Executive Committee.

Further complicating the situation is defendants' testimony that other members of the company felt unsafe working with Goldstein, and that Goldstein's behavior was disruptive' and put the company in a state of turmoil.' Henry Kakel, one of the committee members, has testified on deposition that he linked plaintiff's letters to Goldstein's recent loss in the race for Captain of the company and that he believed that under the circumstances Goldstein's absence for a time would lessen the disruption.

In the final analysis it is virtually impossible to clearly delineate between the contents of Goldstein's letters and the manner in which he

> expressed himself. If the letters had resulted in Goldstein's immediate termination, I would deny defendants' summary judgment motion and leave it for a jury to determine what motivated their decision. However, I am persuaded that precisely because it is impossible to draw a precise line of demarcation and because defendants' action was limited to one of temporary suspension rather than dismissal, they are entitled to the summary judgment they seek.

Petitioners' Appendix D at 63a-64a.

As the above shows, the district court recognized that there were genuine disputes of material facts and that different inferences could be drawn from the facts regarding the motivations of the Petitioners when they suspended Goldstein. By stating that if Goldstein was terminated, as opposed to suspended, it would have denied the Petitioners' motion for summary judgment and "leave it to the jury to determine what motivated their decision," the district court acknowledged that reasonable jurors could determine that the discipline of Goldstein was for an improper purpose. It is a violation of 42 U.S.C. § 1983 to discipline an employee because he exercises his First Amendment right of free speech regardless of the type of discipline issued. Therefore, the district court erred in granting Petitioners' motion for summary judgment because there are material disputes of facts as to the motivations of the Petitioners when they suspended Goldstein.

C. Genuine issues of material facts exist as to whether Goldstein's expulsion from Chestnut was in retaliation of his exercise of his First Amendment right of free speech.

While under suspension, Goldstein could not respond to emergency fire or medical alarms on behalf of Chestnut, could not enter the firehouse, and could not speak or sign documents on behalf of Chestnut. While suspended, on May 20 and 22, 1996, Goldstein, out of the kindness of his heart, agreed to provide CPR training to certain members of Chestnut, one of whom is an individual named Eddie Ryan ("Ryan"). Goldstein was not acting on behalf of Chestnut when he was providing CPR training to Chestnut members in May, 1996.

Petitioners contended below that they expelled Goldstein because he allegedly falsified documents and/or made a false statement to Yaffee with respect to the day on which he kindly conducted CPR training and testing to Ryan, a Chestnut member. Petitioners did not produce any evidence that Ryan did not take and pass a CPR test conducted by Goldstein. Instead, they claimed that they expelled Goldstein because Goldstein initially orally advised Yaffee that Ryan took the class and test on May 20, 1996, and later stated that Ryan took the test on May 22, 1996. Goldstein disputes that he orally advised Yaffee that Ryan took the test on May 20, 1996. Petitioners have admitted that Ryan advised them on at least three occasions that he took the CPR class and test on May 22, 1996.

The issue as to whether Ryan took the CPR class on May 20, 1996, as opposed to May 22, 1996, is a minor matter. A reasonable jury could easily infer and conclude from the

totality of all of the facts in this case, including the threat to expel Goldstein when the Investigating Committee recommended that he be suspended, that Goldstein was not expelled from Chestnut because he supposedly orally advised Yaffee and others that Ryan took CPR class conducted by him on May 20, 1996, as opposed to May 22, 1996; but instead, that Goldstein was expelled from Chestnut because he wrote letters to President Yaffee and the Executive Committee of Chestnut in which he alleged that certain members of Chestnut were responding to emergency fire and medical alarms lacking required training and certification. In addition, because motive and intent on the part of the Petitioners are controlling on this issue, summary judgment was inappropriate on this issue as well.

Again, the district and circuit courts ignored the conflicting evidence on the issue of the Goldstein's expulsion from Chestnut and the competing inferences that could be inferred from said evidence. Instead, the district court, as well as the circuit court, again assessed the credibility of the Petitioners and the reasons asserted by the Petitioners for expelling Goldstein. Based upon the totality of the evidence, a reasonable jury could conclude that not only was Goldstein suspended because he exercise his First Amendment right of free speech, but also that he was terminated for that reason as well.

CONCLUSION

Should this Court grant the petition for writ of certiorari, this Court should also consider and examine the rationale of the district and circuit courts with respect to the entry of summary judgment against Goldstein in light of federal summary judgment principles and this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*

Respectfully submitted,

CHARLES G. BYRD, JR.
ALSTON & BYRD
Attorney for Cross-Petitioner
2518 Maryland Avenue
Baltimore, Maryland 21218
(410) 235-7811